

2008

# State of Utah v. Armand Kwanza Brown : Brief of Appellant

Utah Court of Appeals

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. :  
 :  
 ARMAND KWANZA BROWN, : Case No. 20080435-CA  
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 Defendant/Appellant. : Appellant is not incarcerated

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BRIEF OF APPELLANT

Appeal from a judgment of conviction for aggravated burglary, a second degree felony offense under Utah Code Ann. § 76-6-202 (2003), and aggravated assault, a third degree felony offense under Utah Code Ann. § 76-5-103 (2003), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Stephen L. Henriod, presiding.

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## TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u> .....	iv
<u>JURISDICTIONAL STATEMENT</u> .....	1
<u>STATEMENT OF THE ISSUE AND STANDARD OF REVIEW</u> .....	1
<u>PRESERVATION OF ARGUMENT</u> .....	2
<u>RULES, STATUTES AND CONSTITUTIONAL PROVISIONS</u> .....	2
<u>STATEMENT OF THE CASE</u> .....	2
<u>STATEMENT OF FACTS</u> .....	3
<u>SUMMARY OF THE ARGUMENT</u> .....	5
<u>ARGUMENT</u> .....	6
I. <u>THE JUDGMENT FOR AGGRAVATED BURGLARY IS IN ERROR</u> .....	6
II. <u>THE TRIAL COURT’S RESTITUTION ORDER FOR RELOCATION COSTS IS IMPROPER</u> .....	10
A. <u>BROWN DID NOT AGREE TO PAY, DID NOT ADMIT RESPONSIBILITY FOR, AND WAS NOT CONVICTED OF CONDUCT RELATING TO RELOCATION EXPENSES</u> .....	15
B. <u>NEXT, THE RECORD FAILS TO SUPPORT THE RELOCATION COST</u> .....	19
C. <u>FINALLY, THE PROSECUTER CLAIMED RESTITUTION WOULD COMPENSATE THE VICTIM FOR HER FEAR AND LOSS OF SAFETY. YET RESITUTION IS NOT RECOVERABLE FOR THOSE PURPOSES</u> .....	22
<u>CONCLUSION</u> .....	24

Addendum A: The Judgments

Addendum B: Relevant Statutory Provisions

Addendum C: State v. Wessendorf, 2006 UT App 197, No. 20050771-CA,  
2006 WL 1285028

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Bennett v. Jones, Waldo, Holbrook &amp; McDonough</i> , 2003 UT 9, 70 P.3d 17.....	23
<i>Glaubius v. State</i> , 688 So.2d 913 (Fla. 1997) .....	18, 19
<i>Harnicher v. University of Utah Medical Center</i> , 962 P.2d 67 (Utah 1998) .....	23
<i>Monson v. Carver</i> , 928 P.2d 1017 (Utah 1996).....	13
<i>Parry v. State</i> , 837 P.2d 998 (Utah Ct. App. 1992).....	8, 9
<i>People v. Hamilton</i> , 555 N.E.2d 785 (Ill. App. Ct. 1990), <i>rev'd in part on other grounds</i> , 599 N.E.2d 913 (Ill. 1992) .....	21
<i>State v. Bickley</i> , 2002 UT App 342, 60 P.3d 582 .....	2, 10, 11, 12, 15, 16, 17, 20
<i>State v. Blanchfield</i> , 108 P.3d 173 (Wash. Ct. App. 2005) .....	19
<i>State v. Corbitt</i> , 2003 UT App 417, 82 P.3d 211.....	12, 13, 21, 22
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993).....	7
<i>State v. Forant</i> , 719 A.2d 399 (Vt. 1998).....	19, 22
<i>State v. Galli</i> , 967 P.2d 930 (Utah 1998).....	11, 12
<i>State v. Gibbons</i> , 740 P.2d 1309 (Utah 1987) .....	8
<i>State v. Gibson</i> , 2006 UT App 490, 153 P.3d 771.....	13, 17
<i>State v. Hight</i> , 2008 UT App 118, 182 P.3d 922 .....	12, 13, 18
<i>State v. Lorrain</i> , 761 P.2d 1388 (Utah 1988).....	1, 6, 7, 8, 9
<i>State v. Mast</i> , 2001 UT App 402, 40 P.3d 1143 .....	11, 16, 17, 20
<i>State v. Miller</i> , 2007 UT App 332, 170 P.3d 1141 .....	24
<i>State v. Portentoso</i> , 878 N.E.2d 76 (Ohio Ct. App. 2007) .....	19, 21
<i>State v. Robinson</i> , 860 P.2d 979 (Utah Ct. App. 1993), <i>cert. denied</i> , 878 P.2d 1154 (Utah 1994) .....	13, 17, 18, 21

<i>State v. Saunders</i> , 1999 UT 59, 992 P.2d 951 .....	1, 2
<i>State v. Simonette</i> , 881 P.2d 963 (Utah Ct. App. 1994) .....	10
<i>State v. Thurman</i> , 911 P.2d 371 (Utah 1996) .....	7, 8
<i>State v. Watson</i> , 1999 UT App 273, 987 P.2d 1289 .....	10, 12, 16, 18, 20
<i>State v. Wessendorf</i> , 2006 UT App 197, No. 20050771-CA, 2006 WL 1285028.....	iii, 20, 21
<i>Straub v. Fisher and Paykel Health Care</i> , 1999 UT 102, 990 P.2d 384 .....	22
<i>Walker v. Rocky Mountain Recreation Corp.</i> , 508 P.2d 538 (Utah 1973) .....	23

Page

**Statutes**

Utah Code Ann. § 63-25a-403 (2004) .....	2, 13, 20
Utah Code Ann. § 63-25a-419 (2004) .....	2, 13
Utah Code Ann. § 76-3-201 (Supp. 2007).....	2, 12
Utah Code Ann. § 76-5-103 (2003).....	1
Utah Code Ann. § 76-6-202 (2003).....	1, 8, 9
Utah Code Ann. § 76-6-203 (2003).....	8, 9
Utah Code Ann. § 77-38a-101 (2003) .....	2
Utah Code Ann. § 77-38a-102 (Supp. 2008).....	2, 10, 12, 17, 20, 22, 23
Utah Code Ann. § 77-38a-201 (2003) .....	2, 11, 16
Utah Code Ann. § 77-38a-202 (2003) .....	2, 11, 16
Utah Code Ann. § 77-38a-203 (Supp. 2008).....	2
Utah Code Ann. § 77-38a-301 (2003) .....	2, 10, 12
Utah Code Ann. § 77-38a-302 (Supp. 2008).....	2, 10, 11, 12, 13, 14, 17, 18, 20, 22, 23
Utah Code Ann. § 78A-4-103 (Supp. 2008).....	1

	<u>Page</u>
<b>Rules</b>	
Utah Court Rules Ann. (2008).....	9
Utah R. App. P. 3 (2008) .....	3
Utah R. App. P. 4 (2008) .....	3
Utah R. Crim. P. 11 (2008).....	7, 8
Utah R. Crim. P. 22 (2008).....	2, 6, 7
Utah R. Crim. P. 30 (2008).....	2, 6, 7, 8



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**JURISDICTIONAL STATEMENT**

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e) (Supp. 2008). The trial court entered judgment against Appellant Armand Brown (in error) for aggravated burglary, a second degree felony offense (Utah Code Ann. § 76-6-202 (2003)), and judgment for aggravated assault, a third degree felony offense (Utah Code Ann. § 76-5-103 (2003)). The judgment is attached as Addendum A.

**STATEMENT OF THE ISSUE AND STANDARD OF REVIEW**

A. Whether the judgment and sentence for aggravated burglary is in error since Brown entered a guilty plea for simple burglary.

Standard of Review: Brown has raised the first issue on appeal under the plain-error doctrine. This Court will consider whether an error exists and whether the error is obvious and prejudicial. *See, e.g., State v. Saunders*, 1999 UT 59, ¶¶ 30, 57, 992 P.2d 951 (court will consider plain error on appeal). Also, this Court may consider clerical error for the first time on appeal. *See State v. Lorrach*, 761 P.2d 1388, 1389 (Utah 1988).

B. Whether the trial court's restitution order for Cheree Weatherspoon's relocation costs is in error.

Standard of Review: "We 'will not disturb a trial court's restitution order "unless it exceeds that prescribed by law or [unless the court] otherwise abused its discretion.'"

However, we review a trial court's interpretation of restitution statutes for correctness."

State v. Bickley, 2002 UT App 342, ¶ 5, 60 P.3d 582 (internal citations omitted).

### **PRESERVATION OF ARGUMENT**

Since the first issue was not preserved in the record, Brown has raised it under the plain-error doctrine. See Saunders, 1999 UT 59, ¶ 30 (recognizing that appellate court will consider plain error); see also Utah R. Crim. P. 22(e), 30(b) (2008) (allowing sentencing and clerical errors to be corrected at any time). The second issue was preserved at R. 70-72; 107.

### **RULES, STATUTES AND CONSTITUTIONAL PROVISIONS**

Brown has attached as Addendum B the following statutes, which contain the language in effect in 2007 relating to sentencing and restitution: Utah Code Ann. §§ 63-25a-403 (2004); 63-25a-419 (2004); 76-3-201 (Supp. 2007); 77-38a-101 (2003); 77-38a-102 (Supp. 2008); 77-38a-201 (2003); 77-38a-202 (2003); 77-38a-203 (Supp. 2008); 77-38a-301 (2003); and 77-38a-302 (Supp. 2008).

### **STATEMENT OF THE CASE**

#### **Nature of the Case, Course of the Proceedings, Disposition in the Court Below**

On January 30, 2007, the State filed an information against Brown for aggravated burglary, aggravated assault, violation of a no-contact order, assault, and damage to a

communication device. (R. 1-4). On March 12, 2007, Brown entered a guilty plea for burglary and aggravated assault. (R. 26; 126). The State dismissed the remaining charges. (R. 26).

On August 24, 2007, the trial court sentenced Brown to suspended prison terms and placed him on probation for 36 months. (R. 57-59). In addition, the court ordered that defendant “pay full restitution and the State has 180 days to submit an Order.” (R. 58). On February 29, 2008, the State filed a Motion for Restitution. (R. 61-69). On March 8, 2008, Brown objected. (R. 70-72). On April 18, 2008, the trial court held a hearing on the matter and ordered restitution as requested by the State. (R. 88-90). Brown filed a notice of appeal. (R. 91).

The appeal is timely. Utah R. App. P. 3 and 4 (2008). Brown is not incarcerated.

### **STATEMENT OF FACTS**

In January 2007, the State filed an information against Brown for aggravated burglary, aggravated assault, violation of a no-contact order, assault, and damage to a communication device. (R. 1-4). In March, Brown entered a plea of guilty to charges for burglary and aggravated assault, and the State dismissed the remaining counts. (R. 26-33; 126). The plea affidavit described the factual grounds for the offenses as follows: “At 2803 South Adams Street, in [Salt Lake County], Utah, on or about January 23, 2007, Armand Kwanza Brown entered the home of his girlfriend [Cheree Weatherspoon] without permission and got in a fight with her mother Spring Weatherspoon who received a cut to her hand.” (R. 27; *see also* R. 126:4). The affidavit also identified the elements for the offenses as follows: “(A) The defendant entered or remained unlawfully in the

dwelling of another with intent to commit assault. (B) The defendant threatened with use of unlawful force causing bodily injury to another.” (R. 27; 126).

After entry of the plea, the trial court ordered a presentence investigation report (see R. 24; 35, Presentence Report), which included Brown’s “statement regarding this offense.” (R. 35, Presentence Report: 3). It stated,

I was coming home to my house to get my things far as clothes and I had got into an argument with Cheree and her mother was drunk and she had attack me from behind. She had threw water in my face and she had threw a glass jar at me and she had missed me and it fell on the kitchen floor and it had bust everywhere. So I had pushed her off me and she had ran towards the kitchen. She had slipped and fell and had cut her hand on the floor and she had started to bleed. So me and Cheree was still arguing she had hit me and we started to fight so I had left outside the house and I had told her to give me my clothes and she said know so I had push the door in kinda hard and the door broke. I feel like I should have got the police and told them to assist me in getting my clothes stead arguing and fighting and taken it to a whole nother level. I feel bad because deep down I still love them and we could solve are own problems but I will learn from my mistakes. The reason all this happened was because I was coming to her house off of work and I had seen a black guy parking outside of the house and I thought that she was seing him steady me trying to talk to her I just started yelling and one thing led to another and her mom was drunk and she just started to attack me so I had defend myself.

(R. 35, Presentence Report: 3; see also R. 49, Psychological Evaluation: 4-5 (reflecting defendant’s statement about the offenses)). The presentence report contained no information about Spring or Cheree Weatherspoon or restitution. (R. 35, Presentence Report: 5 (stating “This agent received no victim impact statement’s [sic], medical information or restitution information. This agent attempted to telephone the victims at the number provided however a recording stated they were unavailable because the phone was off or they were outside of the service area.”)). Adult Probation and Parole

recommended a “restitution hearing be scheduled within 60 days of sentencing.” (*Id.*)

On August 24, 2007, the trial court entered judgment against Brown. It sentenced him to suspended prison terms and probation for aggravated burglary and aggravated assault, and it ordered him to pay “full restitution.” (R. 57-59). Also, the court ordered the State to submit a restitution amount within “180 days.” (R. 57-59; 107:9). On February 29, 2008, the State filed a request for \$2,970.72 in restitution. (R. 61). It filed the request 189 days after the entry of judgment. The State included documents from the Office of Crime Victims’ Reparations, which showed reparations paid to Cheree Weatherspoon for ambulance expenses (\$989.74), two months’ rent (\$1,300.00), and rent deposit (\$500), and reparations paid to Spring Weatherspoon for medical expenses (\$180.98). (R. 65-69).

Brown objected to the State’s request for restitution as untimely, and he objected to restitution for rent deposit and two months’ rent (\$1,800) since defendant “was not charged with any financial or rental scheme nor was he charged with any damage to any real property. The defendant did not admit responsibility for any conduct consisting of any rental restitution at the time of sentencing.” (R. 70-72). The trial court rejected Brown’s arguments and ordered restitution in the full amount. (R. 89-90; 107:16).

### **SUMMARY OF THE ARGUMENT**

The trial court erred in entering a judgment and sentence against Brown for count 1, aggravated burglary, a second degree felony offense. According to the record, the State amended count 1 against Brown, and he entered a guilty plea for simple burglary. Thereafter, the trial court entered judgment for aggravated burglary. The trial court

committed plain or clerical error. Brown requests that this Court vacate the judgment for aggravated burglary and remand the case for entry of a corrected judgment and sentence.

Next, the trial court ordered Brown to reimburse Crime Victims' Reparations for relocation costs paid to Cheree Weatherspoon. The trial court's order for restitution is improper since Brown did not agree to pay restitution for relocation costs, and he did not admit responsibility for and was not convicted of criminal activities relating to relocation expenses. In addition, the restitution order for relocation costs is speculative, insupportable and arbitrary. Finally, the prosecutor requested relocation costs to compensate Cheree Weatherspoon for "fear" and loss of "safety." Compensation for those purposes is more properly characterized as damages for pain and suffering. Such damages are not recoverable as restitution under Utah law. Brown respectfully requests that this Court vacate the trial court's restitution order as it relates to relocation costs.

## **ARGUMENT**

### **I. THE JUDGMENT FOR AGGRAVATED BURGLARY IS IN ERROR.**

Rule 22(e) states that a court "may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e) (2008). Rule 30 allows a court to correct a clerical mistake in the judgment at any time. *Id.* at 30(b) (2008). The Utah Supreme Court has relied on those provisions to ensure that a written judgment is in harmony with the trial court's oral pronouncements in the proceedings.

In *State v. Lorrach*, 761 P.2d 1388 (Utah 1988), the defendant entered a guilty plea for rape of a child, which carried a minimum-mandatory prison term, and the trial court

ordered the defendant to serve a prison sentence of at least ten years. *Id.* at 1389. Thereafter, a substitute clerk completed a preprinted judgment form providing for a sentence “not to exceed” ten years. *Id.* The trial court amended the judgment (twice) so that it would be in harmony with the originally pronounced minimum-mandatory sentence, and the defendant appealed. *Id.* On review, the Utah Supreme Court affirmed the amended judgment as proper. It cited to Rules 22(e) and 30(b), and stated that “both clerical errors and illegal sentences may be corrected at any time.” *Id.* at 1389-90.

In this case, Brown entered a guilty plea in open court to a charge for count 1, simple burglary, a second degree felony offense; and count 2, aggravated assault, a third degree felony offense. (R. 26; 126); *see* Utah R. Crim. P. 11 (2008) (allowing for the entry of a guilty plea); *see also State v. Thurman*, 911 P.2d 371, 372-73 (Utah 1996) (stating a trial court must ensure that the guilty plea is knowing and voluntary and that the defendant understands the nature and elements of the offense). The trial court accepted the guilty pleas. (*See* R. 33).

However, during sentencing, the court entered judgment for count 1, “aggravated” burglary, a second degree felony offense. (R. 57). That was error. This Court may vacate the judgment, and order correction of the error under Rules 22(e) and 30(b) and under the plain-error doctrine. The written judgment reflects clerical error in sentencing that may be corrected at any time. *Lorrah*, 761 P.2d at 1389-90; Utah R. Crim. P. 22(e), 30(b). In addition, under the plain-error doctrine, the record supports that (i) an error exists, (ii) the error is obvious, and (iii) the error is prejudicial. *See State v. Dunn*, 850 P.2d 1201, 1224 (Utah 1993) (identifying plain-error standard).

Under the first and second prongs of the plain-error doctrine, an obvious error exists where the parties and court intended Brown to plead guilty to an amended count 1 for simple burglary, a second degree felony offense. (See R. 26; 126); see also Utah Code Ann. §§ 76-6-202(2) (stating burglary is a second degree felony); 76-6-203(2) (2003) (stating aggravated burglary is a first degree felony). (But see R. 57-59; 89-90 (entering judgment for *aggravated* burglary, amended to a second degree felony)).

Also, based on this record, it is obvious that Brown did not knowingly or voluntarily enter a guilty plea to a charge for *aggravated* burglary: he was not advised at the time of the plea of the elements for aggravated burglary, and he did not admit to facts or elements constituting aggravated burglary (Utah Code Ann. 76-6-203(1) (defining aggravated burglary)), among other things. (See R. 26; 126); see also Utah R. Crim. P. 11(e) (setting forth the requirements of the trial court in taking a plea); Thurman, 911 P.2d at 372 (stating trial court must establish that the plea is knowing and voluntary and that defendant understands the nature and elements of the offense); State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987) (stating Rule 11(e) places on trial courts “the burden of ensuring that constitutional” requirements are met for guilty pleas).

Nevertheless, the trial court entered judgment and sentence on count 1, “aggravated” burglary, a second degree felony offense. (R. 57-59; 89-90). Brown does not contend that the entry was “the deliberate result of the exercise of judicial reasoning and determination.” Lorrah, 761 P.2d at 1389 (citation omitted). Rather, it was clerical error. Id.; Utah R. Crim. P. 30(b). Also, it was plain and obvious error under the first and second prongs of the plain-error analysis. See Parry v. State, 837 P.2d 998, 999



(Utah Ct. App. 1992) (ruling that aggravated burglary is a first degree felony; also “aggravated burglary” for a lesser degree “is a legal impossibility under Utah law”).

Under the third prong of the plain-error analysis, the error was prejudicial. Specifically, prejudice exists due to the ambiguity caused by the written judgment. See Parry, 837 P.2d at 999 (recognizing the ambiguity when aggravated burglary is identified as a lesser offense). The judgment here reflects “aggravated” burglary, a second degree felony. (R. 57-59; 89-90). Yet simple burglary of a dwelling is a second degree felony. See Utah Code Ann. § 76-6-202(2); see also Utah Code Ann. § 76-6-203(2) (stating aggravated burglary is a first degree felony offense). If the ambiguity is not resolved, and if the judgment is not corrected to reflect a conviction for burglary, the ambiguity may be used against Brown to his detriment in future filings. That is, if Brown is convicted of a criminal offense in the future, Adult Probation and Parole may assess the “aggravating” aspect of the burglary offense here to recommend a harsher term in sentencing against Brown in that future case. See, e.g., Utah Court Rules Ann., App. D at 1640 (2008) (setting forth sentencing guidelines based on violent history and offenses).

Since Brown did not plead here to aggravated burglary or to an aggravated second degree felony offense (R. 26), it would be unfair and improper to reflect such a conviction on his record or to use it against him in future proceedings. To ensure that does not happen, Brown respectfully requests that this Court vacate the judgment and sentence for count 1, aggravated burglary, a second degree felony offense (see R. 57-59; 89-90), and remand the case to the trial court for the entry of a corrected judgment and sentence in the matter. See Lorrah, 761 P.2d at 1389-90.

## **II. THE TRIAL COURT'S RESTITUTION ORDER FOR RELOCATION COSTS IS IMPROPER.**

A trial court may order restitution if the defendant (i) has agreed to pay restitution as part of a plea disposition, (ii) has admitted responsibility for criminal conduct resulting in pecuniary damages, or (iii) has been convicted of a crime that resulted in pecuniary damages. *See* Utah Code Ann. §§ 77-38a-301 (2003); 77-38a-302(1), (5)(a) (Supp. 2008); *Bickley*, 2002 UT App 342, ¶ 9 (stating defendant may be ordered to pay restitution “for crimes not listed in the information so long as a defendant admits responsibility or agrees to pay restitution”, and recognizing defendant may be ordered to pay restitution in connection with a conviction) (citation omitted); *State v. Watson*, 1999 UT App 273, ¶ 3, 987 P.2d 1289 (same); *State v. Simonette*, 881 P.2d 963, 964-65 (Utah Ct. App. 1994) (stating defendant could be ordered to pay for treatment costs relating to the victim’s brother where he admitted in a diagnostic report to abusing the brother); *see also* Utah Code Ann. § 77-38a-102(2) (Supp. 2008) (defining “[c]riminal activities” to mean “any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct”).

Under the first alternative, the law requires a prosecutor to disclose restitution amounts at the time of the plea disposition, as follows:

- (1) At the time of entry of a conviction or entry of any plea disposition of a felony or class A misdemeanor, the attorney general, county attorney, municipal attorney, or district attorney shall provide to the district court:
  - (a) the names of all victims, including third parties, asserting claims for restitution;

(b) the actual or estimated amount of restitution determined at that time; and

(c) whether or not the defendant has agreed to pay the restitution specified as part of the plea disposition.

\* \* \*

(3) If charges are not to be prosecuted as part of a plea disposition, restitution claims from victims of those crimes shall also be provided to the court.

Utah Code Ann. § 77-38a-202 (2003); see also Utah Code Ann. § 77-38a-201 (2003)

(requiring law enforcement to assess claims of restitution when conducting an

investigation into criminal conduct). Thereafter, if the defendant agrees to pay, the trial

court may order restitution in a particular amount. See Utah Code Ann. § 77-38a-302(1).

If the defendant “objects to the imposition, amount, or distribution of the restitution, the

court shall allow the defendant a full hearing on the issue.” Id. at § 77-38a-302(4); see

also Bickley, 2002 UT App 342, ¶¶ 3, 10-12 (recognizing that defendant “agree[d] that

total victim restitution be entered in the amount of my obligation for child support

arrears” as determined by the court; also, defendant objected to the trial court’s order).

Under the second alternative, the defendant may be ordered to pay restitution “for crimes not listed in the information so long as [he] admits responsibility” for the conduct.

Bickley, 2002 UT App 342, ¶ 9. The law requires “that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitu-

tion.” State v. Mast, 2001 UT App 402, ¶ 18, 40 P.3d 1143 (citation omitted) (ruling defendant cannot be required to pay restitution where she did not admit responsibility or

agree to pay amounts). Indeed, a trial court may not infer a defendant’s participation in

conduct (see Mast, 2001 UT App 402, ¶ 18 (citing State v. Galli, 967 P.2d 930, 937-38

(Utah 1998))), an admission of responsibility from the defendant (*Bickley*, 2002 UT App 342, ¶ 12 (citing *Watson*, 1999 UT App 273, ¶ 5)), or a defendant's state of mind (*Watson*, 1999 UT App 273, ¶ 5) to justify restitution under the second alternative.

Under the third alternative, once a defendant pleads guilty to an offense, the trial court has broad discretion to order restitution supported by the evidence “for any pecuniary damages clearly resulting from” that offense. *State v. Hight*, 2008 UT App 118, ¶ 5, 182 P.3d 922 (citing *State v. Corbitt*, 2003 UT App 417, ¶ 16, 82 P.3d 211). In *Hight*, the defendant pled guilty to burglary, among other things, and the trial court ordered him to compensate the victim for “items missing from the premises he admitted to burglarizing.” *Id.* at ¶¶ 1-3. This Court upheld the restitution order since the missing items related to the burglary conviction. *See id.* at ¶¶ 5-6 (citation omitted).

In addition to specifying when a defendant may be ordered to pay restitution for his conduct, Utah law specifies what damages may be recoverable in restitution. According to the law, a trial court may order restitution for pecuniary damages. *See* Utah Code Ann. § 76-3-201(4)(a) (Supp. 2007) (stating a court may order restitution for pecuniary damages); *see also* Utah Code Ann. §§ 77-38a-301; 77-38a-302(1). The phrase “[p]ecuniary damages” is defined to mean demonstrable damages for “economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities” and it includes “the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.” Utah Code Ann. § 77-38a-102(6) (Supp. 2008); *see*

also *State v. Gibson*, 2006 UT App 490, ¶ 8, 153 P.3d 771 (“when considering what the victim ‘could recover against the defendant in a civil action,’ the action must arise ‘out of the facts or events constituting the defendant's criminal activities’”) (citation omitted).

According to the Utah Supreme Court, the restitution provisions limit recovery to those amounts which are “necessary to compensate a victim for losses caused by the defendant.” *Monson v. Carver*, 928 P.2d 1017, 1027 (Utah 1996); see also Utah Code Ann. § 77-38a-302(2)(a) (stating restitution compensates for “all losses caused by the defendant”); *Hight*, 2008 UT App 118, ¶ 5 (stating restitution may be ordered where evidence supports damages “clearly resulting” from the offense); *Corbitt*, 2003 UT App 417, ¶¶ 19-28 (Orme, J., concurring) (explaining that Utah courts have prohibited restitution awards for “dignitary invasions,” or damages for an affront to a person’s dignity or emotional harm) (citation omitted); *State v. Robinson*, 860 P.2d 979, 983 (Utah Ct. App. 1993) (stating restitution should be ordered “where liability is clear as a matter of law and where commission of the crime clearly establishes causality of the injury or damages”), cert. denied, 878 P.2d 1154 (Utah 1994).

Also, if a victim accepts an award of reparations from Crime Victims’ Reparations, she must assign all claims for restitution to that entity. See Utah Code Ann. §§ 63-25a-403(3); 63-25a-419(1) (2004). The amount that CVR pays to a victim is not binding on a court in “determining the order of restitution” imposed against a defendant; indeed, a court “shall not consider a reparations award when determining the order of restitution nor when enforcing restitution.” See Utah Code Ann. § 63-25a-403(2); see also Utah Code Ann. § 77-38a-302(5)(b) (identifying criteria for restitution where the

court shall consider the cost of damage or loss for destruction of property, the cost of medical and professional services and devices for care and treatment rendered, the cost of physical and occupational therapy and rehabilitation, lost income to the victim, lost wages due to theft of or damage to items necessary to the victim's employment or trade, and the cost of funeral and related services as a result of the victim's death).

In this case, Brown pled guilty to two offenses: burglary of Cheree Weatherspoon's residence with intent to commit assault, and aggravated assault against Spring Weatherspoon. (R. 26-33 (stating the offenses occurred in January 2007)). Several months after sentencing, the State submitted paperwork for restitution. (R. 61-69). The paperwork showed reparations to Cheree and Spring Weatherspoon for ambulance and medical expenses (\$989.74 and \$180.98 respectively), rent deposit for August 2007 (\$500), and rent for August and September 2007 (\$1300). (R. 65-69). The State requested restitution in the full amount of reparations. (R. 61). According to the prosecutor, Brown should be ordered to pay restitution for relocation costs, *i.e.* rent deposit and two months' rent, because the offenses caused Cheree to fear and "to lose" her safety, "her feeling of safety anyway." (R. 107:12-13). Also, Cheree made the "choice" to relocate. (R. 107:13).

Brown objected to such restitution as inappropriate. (R. 70-72); Utah Code Ann. § 77-38a-302(4) (stating if defendant objects, he is entitled to a full hearing). He maintained he was not liable for costs incurred by Cheree for rent deposit and two months' rent several months after the offenses. (*See* R. 107:13-14).

Thereafter, the trial judge allowed restitution in the entire amount. (R. 107:16). The judge stated, “You know, she probably lost the deposit [on her former residence] because he kicked in the door, you know, that’s what those things are supposed to cover. I’m going to order the full amount of restitution.” (*Id.*)

The trial court’s order was improper since Brown did not agree to pay, he did not admit responsibility for, and he was not convicted of conduct relating to relocation expenses. (*See infra*, Argument II.A.) In addition, the record fails to support restitution for such expenses. (*See infra*, Argument II.B.) Finally, under Utah law, a trial court may not order restitution to compensate for fear and loss of safety. (*See infra*, Argument II.C.) Brown respectfully requests that this Court vacate the trial court’s restitution order as it relates to rent deposit and two months’ rent.

**A. BROWN DID NOT AGREE TO PAY, DID NOT ADMIT RESPONSIBILITY FOR, AND WAS NOT CONVICTED OF CONDUCT RELATING TO RELOCATION EXPENSES.**

Under the law, Brown “cannot be ordered to pay restitution for criminal activities for which [he] did not admit responsibility, was not convicted, or did not agree to pay restitution.” *Bickley*, 2002 UT App 342, ¶ 9. First, Brown did not agree to pay relocation costs as part of the plea agreement. (*See* R. 26-33 (stating that “[a]ll the promises, duties, and provisions of the plea agreement, if any, are fully contained in this statement, including those explained” on “page one”; and reflecting the promise and duty at page one to plead guilty to burglary and aggravated assault); *see also* R. 126). The State’s filings acknowledged as much. (*See* R. 61 (recognizing that defendant may “submit[] an objection” to restitution “in writing”)). In addition, the State failed to identify any

amounts in restitution at the time of the plea disposition. (See R. 26-33; 126); Utah Code Ann. § 77-38a-202(1); see also Utah Code Ann. § 77-38a-201 (requiring law enforcement to include report for restitution when conducting an investigation for criminal conduct); Bickley, 2002 UT App 342, ¶¶ 3, 10 (recognizing that as part of the plea agreement, defendant specifically agreed that “total victim restitution be entered in the amount of my obligation for child support arrears . . . with the understanding that the amount of court[-]ordered restitution and monthly [payments] remain to be determined by the court”). Thus, Brown cannot be required to pay restitution on that basis.

Second, Brown did not admit responsibility for conduct resulting in relocation costs. According to this Court, if the defendant admits responsibility for conduct, the trial court must ensure that the “responsibility for the criminal conduct” is “firmly established, much like a guilty plea, before the court can order restitution. . . .” Mast, 2001 UT App 402, ¶ 13 (citing Watson, 1999 UT App 273, ¶ 5); see also Bickley, 2002 UT App 342, ¶ 12 (recognizing restitution may not be ordered where defendant’s responsibility was not “firmly established”). In connection with the guilty pleas here, Brown admitted responsibility for conduct as follows. On January 23, 2007, he entered or remained unlawfully in Cheree’s residence without permission and with intent to commit assault, he argued with Cheree and yelled, he hit Cheree, he fought with Spring and pushed her causing her to slip and injure herself, and he broke a door. (See R. 27; see also R. 126:4; 35, Presentence Report: 3; 49, Psychological Evaluation: 4-5). Based on those admissions, the trial court could order restitution for costs incurred as a result of



entering Cheree's residence without permission and with intent to commit assault, arguing with Cheree and hitting her, fighting with Spring and causing injury, and breaking the door. See Utah Code Ann. § 77-38a-302(5)(b) (stating court shall consider costs for damaged or destroyed property, costs for medical and professional services and care, costs for therapy and rehabilitation, and lost income and wages).

However, the court could not order restitution for the relocation costs. The rental expenses purportedly arose on August 1 and September 1, several months after the conduct in this case. (See R. 65-66). They are not related to conduct for which Brown admitted responsibility, since he did not admit to conduct for August or September, and he did not admit to future conduct against Cheree and Spring. (See R. 26-33; 126; see also R. 35, Presentence Report: 3; 49, Psychological Evaluation: 4-5). In addition, according to the prosecutor, Cheree's decision to move was a "choice." (See R. 107:13). On this record, there is no basis for claiming that rental costs for August and September 2007 arose "out of the facts or events constituting the defendant's criminal activities." Utah Code Ann. § 77-38a-102(6); Gibson, 2006 UT App 490, ¶ 8 (stating damages must arise from "facts or events constituting the criminal activities"); Robinson, 860 P.2d at 983 (stating liability for restitution must be "clear as a matter of law").

To the extent the trial court made inferences about Brown's admissions or his conduct to support an award for relocation costs, the inferences were improper. See Bickley, 2002 UT App 342, ¶ 12 (recognizing trial court may not infer that defendant admitted responsibility for conduct outside the charged period) (citation omitted); Mast, 2001 UT App 402, ¶ 18 (stating guilty plea for receiving stolen property did not make

defendant responsible for all damages resulting from burglary, since the trial court could not infer defendant's participation in burglary) (citation omitted); Watson, 1999 UT App 273, ¶ 5 (stating trial court may not infer defendant's involvement in murder where she entered a guilty plea for obstruction of justice); (see also infra, Argument II.B., herein). Thus, Brown cannot be required to pay restitution for relocation costs on that basis.

Third, Brown was not convicted of offenses that “clearly result[ed]” in expenses for rent deposit and two months’ rent. See Hight, 2008 UT App 118, ¶ 5 (stating when a defendant pleads guilty, the court has discretion to order restitution for “pecuniary damages clearly resulting from” the offense). He was convicted of committing a burglary and aggravated assault in January 2007. (R. 26-33). Thus, he could be ordered to pay for property damaged or destroyed, medical or professional services or care, therapy and rehabilitation, and lost income or wages “clearly resulting” from those crimes. See Hight, 2008 UT App 118, ¶ 5; Utah Code Ann. § 77-38a-302(5)(b).

However, he could not be ordered to pay relocation costs incurred approximately seven months later. Brown did not plead guilty to crimes involving future acts or conduct for August and September 2007. (See R. 26-33; 126). Moreover, the record fails to support that the relocation costs are related to the January crimes. (See record in general; see also infra, Argument II.B., herein). Thus, the trial court’s restitution order for rent deposit and two months’ rent was in error. See Hight, 2008 UT App 118, ¶ 5 (stating restitution may be ordered if damages “clearly result[ed]” from the offense); Robinson, 860 P.2d at 983 (stating restitution may be ordered where “commission of the crime clearly establishes causality of the injury or damages”); see also Glaubius v. State, 688

So.2d 913, 915 (Fla. 1997) (stating for restitution, the damage must be causally connected to the offense and it must bear a significant relationship to it); State v. Portentoso, 878 N.E.2d 76, 78-79 (Ohio Ct. App. 2007) (stating trial court abused discretion in ordering defendant to pay restitution in the amount of \$10,447.10 to the victim following his guilty pleas to attempted aggravated assault and menacing by stalking; victim's moving expenses for rent, storage, and trips to Michigan did not relate to actual loss suffered); State v. Forant, 719 A.2d 399, 403 (Vt. 1998) (stating the government must demonstrate “causation between the defendant's criminal act and the victim's loss”; “[a]n order of restitution must relate directly to the damage caused by the defendant's criminal act for which he was convicted. If there is no direct link between the crime and the restitution, the claimed damage may not be awarded”); State v. Blanchfield, 108 P.3d 173, 176 (Wash. Ct. App. 2005) (stating domestic violence victim's hotel and moving expenses, and the value of her unreturned belongings were not causally connected to the assault for which defendant was convicted, and therefore, should not have been part of trial court's restitution order). This Court may reduce the restitution award in the amount of the relocation costs on that basis.

**B. NEXT, THE RECORD FAILS TO SUPPORT THE RELOCATION COSTS.**

The trial court justified restitution for relocation costs on the grounds that the victim “probably lost the deposit” on her former residence because Brown damaged the door. (R. 107:16). It stated, “that’s what those things [deposits] are supposed to cover. I’m going to order the full amount of restitution.” (R. 107:16). The record fails to support the trial court’s ruling as a matter of law.

Specifically, in connection with the request for restitution, the State presented documents prepared by CVR for purposes of a reparations award. (R. 65-69). That was insufficient. Under Utah law, a court “shall not consider a reparations award when determining the order of restitution.” Utah Code Ann. § 63-25a-403(2); see also Utah Code Ann. § 77-38a-302(5)(b) (identifying criteria to consider in ordering restitution).

In addition, the trial court based its ruling on assumptions and speculation. (R. 107:16 (stating Cheree “probably” incurred costs)). That was improper. See Bickley, 2002 UT App 342, ¶ 12 (recognizing trial court may not make inferences); Mast, 2001 UT App 402, ¶ 18 (stating the restitution standards do not allow the trial court to make inferences to support an order for restitution); Watson, 1999 UT App 273, ¶ 5 (recognizing trial court may not make inferences); State v. Wessendorf, 2006 UT App 197, No. 20050771-CA, 2006 WL 1285028 (attached as Addendum C) (stating restitution for estimated cost of repair was improper where victim did not repair car but sold it for the same amount for which she bought it); (see also supra, pp. 11-12, 16-18). “There was no testimony about any out-of-pocket expense that the victim incurred due to [defendant’s] conduct,” Wessendorf, 2006 UT App 197, and no information connecting the crimes in January to rent deposit and rent for August and September 2007. (See record).

Assuming arguendo Cheree lost a deposit on her former residence because Brown damaged the door, the cost for repairs and/or the amount in lost deposit may have been relevant to the assessment here. See Utah Code Ann. § 77-38a-102(6) (defining pecuniary damages as amounts “arising out of the facts or events constituting the defendant's criminal activities” and including “the fair market value” of destroyed,

broken, or harmed property); see also *People v. Hamilton*, 555 N.E.2d 785, 789 (Ill. App. Ct. 1990) (ruling that victim's statement concerning replacement cost for damaged doors was sufficient), rev'd in part on other grounds, 599 N.E.2d 913 (Ill. 1992). As this Court has stated, "[t]he appropriate measure of the loss or damage to a victim is fact-sensitive." *Corbitt*, 2003 UT App 417, ¶ 15.

However, the record fails to contain any information on the matter. (See record). It fails to support that Cheree incurred repair costs for the door, that she moved in August because of Brown or damage to the door, that she paid a refundable deposit on her former residence, or that she lost the deposit in whole or part because of Brown's conduct. (See record); see also *Wessendorf*, 2006 UT App 197 (reversing restitution where record failed to support that victim made repairs); *Robinson*, 860 P.2d at 983 (allowing restitution only where "commission of the crime clearly establishes causality of the injury or damages"). Moreover, there is no basis for holding Brown responsible for rent in August and September. The award for two months' rent – as opposed to one month's rent or six months' rent – is arbitrary and has no connection to the January offenses. (See record). Based on the record here, "[i]t is important to note that [the victim] would have been paying housing expenses, regardless of the location" and regardless of this case. *Portentoso*, 878 N.E.2d at 79. Indeed, the record fails to support that Cheree *would not* have paid rent in August and September, *but for* Brown's conduct in January. See *Robinson*, 860 P.2d at 983 (allowing restitution only where liability is clear and the crime caused damages). Since the record fails to support any connection between Brown and the relocation costs, this Court may order that restitution be reduced by those amounts.

C. FINALLY, THE PROSECUTOR CLAIMED RESTITUTION WOULD COMPENSATE THE VICTIM FOR HER FEAR AND LOSS OF SAFETY. YET RESTITUTION IS NOT RECOVERABLE FOR THOSE PURPOSES.

The prosecutor claimed that restitution for relocation costs would compensate the victim for fear and loss of safety. (R. 107:12, 13 (also stating that relocation was a “choice” that Cheree made, and she relocated seven months after the offenses in this case)). Damages for those purposes may be more properly classified as emotional harm or damages for pain and suffering. *See, e.g., Straub v. Fisher and Paykel Health Care*, 1999 UT 102, ¶¶ 7-15, 990 P.2d 384 (recognizing the civil claim of infliction of emotional distress); *see also Forant*, 719 A.2d at 403 (recognizing that even though the victim could identify an ascertainable amount for expenses incurred out of fear for her safety, those amounts would be classified as “essentially emotional distress damages”). Such damages are not recoverable in restitution. *See* Utah Code Ann. §§ 77-38a-302(1) (limiting restitution to pecuniary damages); 77-38a-102(6) (defining pecuniary damages as economic injury “a person could recover in a civil action”; and specifically prohibiting restitution for pain and suffering); *see also Corbitt*, 2003 UT App 417, ¶¶ 27-28 (Orme, J., concurring) (specifying that Utah courts do not permit restitution for “dignitary invasions,” including emotional harm) (citation omitted); *Forant*, 719 A.2d at 403 (stating while statutes permit compensation for “[p]ecuniary loss” – which is defined as “medical or medically related expenses, lost wages” and other economic losses – victim may not recover “indirect costs” to compensate for her fear that defendant may access the house in the future and “harass her”).

In addition, based on the limited information contained in the record in this case,

such damages may not be recoverable in a civil action. Mere unsubstantiated opinions that a person has suffered distress and fear are insufficient. See Harnicher v. University of Utah Medical Center, 962 P.2d 67, 70 (Utah 1998) (recognizing that in a claim for negligent infliction of emotional distress, “[p]laintiffs’ mere unsubstantiated opinions that they have suffered severe anxiety as a result of their exposure” will not create an issue of fact that will withstand summary judgment); Walker v. Rocky Mountain Recreation Corp., 508 P.2d 538, 542 (Utah 1973) (ruling that “[s]tatements made merely on information and belief will be disregarded”); see also Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, ¶ 64, 70 P.3d 17 (stating a civil claim for intentional infliction of emotional distress “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities”; a claim will not be supported merely because defendant engaged in conduct that is “tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal”).

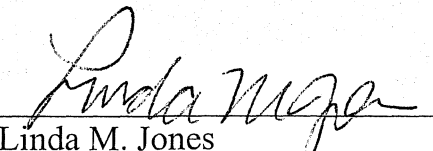
In this case, the prosecutor made an unsubstantiated and unsupported claim that Cheree should be entitled to recover relocation costs incurred seven months after the offenses as compensation for fear and loss of safety. (R. 107:12-13). Those statements constitute an insufficient claim for emotional distress. See Harnicher, 962 P.2d at 70 (recognizing that “[p]laintiffs’ mere unsubstantiated opinions that they have suffered severe anxiety as a result of their exposure” are insufficient). Since such damages are not recoverable in restitution, the award is improper. See Utah Code Ann. § 77-38a-302(1) (limiting restitution to pecuniary damages); id. at § 77-38a-102(6) (defining pecuniary damages as economic injury “a person could recover in a civil action”; and prohibiting

restitution for pain and suffering); State v. Miller, 2007 UT App 332, ¶¶ 12-13, 170 P.3d 1141 (recognizing that amounts not recoverable in a civil action may not be a basis for restitution); (see also R. 107:13 (prosecutor acknowledged that Cheree's relocation was a matter of "choice"))). The trial court erred in ordering restitution for relocation costs.

### **CONCLUSION**

For the reasons set forth herein, Brown respectfully requests that this Court vacate the judgment for aggravated burglary and remand the case for entry of a corrected judgment and sentence. Also, Brown respectfully requests that this Court vacate the trial court's restitution order as it relates to relocation costs.

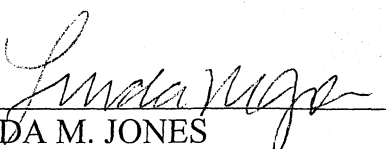
SUBMITTED this 3 day of November, 2008.

  
Linda M. Jones  
Attorney for Defendant/Appellant



### **CERTIFICATE OF DELIVERY**

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 3 day of November, 2008.

  
LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this \_\_\_ day of \_\_\_\_\_, 2008.

Tab A

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
 :  
vs. : Case No: 071900771 FS  
 :  
ARMAND KWANZA BROWN, : Judge: STEPHEN L HENRIOD  
Defendant. : Date: August 24, 2007  
Custody: Prison

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PRESENT

Clerk: lym  
Prosecutor: HILLS, BLAKE R  
Defendant  
Defendant's Attorney(s): CLARK, KIMBERLY A

DEFENDANT INFORMATION

Date of birth: February 1, 1981  
Audio  
Tape Number: 76 Tape Count: 113418

CHARGES

1. AGGRAVATED BURGLARY (amended) - 2nd Degree Felony  
Plea: Guilty - Disposition: 03/12/2007 Guilty
2. AGGRAVATED ASSAULT - 3rd Degree Felony  
Plea: Guilty - Disposition: 03/12/2007 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED BURGLARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.  
The prison term is suspended.

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.  
The prison term is suspended.

Case No: 071900771  
Date: Aug 24, 2007

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#### ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.

#### PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.

Submit to searches of person and property upon the request of any Law Enforcement Officer.

Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.

Violate no laws.

Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.

Not frequent any place where drugs are used, sold, or otherwise distributed illegally.

Refrain from the use of alcoholic beverages.

Court ordered no contact with victim.

The defendant is to complete an Anger Management Program until successful;

The defendant is to pay full restitution and the State has 180 days to submit an Order;

The defendant is to have evaluations on anger management, substance abuse and domestic violence and complete any treatment recommended;

The defendant is to maintain full time verifiable employment approved by AP&P or combination of employment and school/training;

The defendant has a curfew set by AP&P and ankle monitor if AP&P deems appropriate;

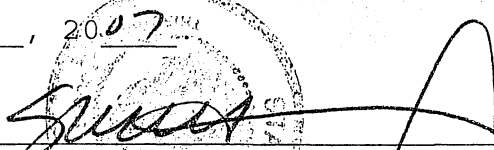
The defendant is to obtain his high school diploma or GED;

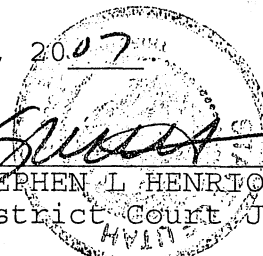
Case No: 071900771  
Date: Aug 24, 2007

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The defendant is to be released on this case.

Dated this 24 day of August, 2007

  
STEPHEN L. HENRICH  
District Court Judge



3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	RESTITUTION HEARING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 071900771 FS
	:	
ARMAND KWANZA BROWN,	:	Judge: STEPHEN L. HENRIOD
Defendant.	:	Date: April 18, 2008
Custody: Own Recognizance		

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Clerk: mckaem  
Prosecutor: MICKLOS, ANGELA F  
Defendant's Attorney(s): GARDNER, BRIAN J  
DEFENDANT INFORMATION  
Date of birth: February 1, 1981  
Audio  
Tape Number: 9-08 W47 Tape Count: 10:22

CHARGES

1. AGGRAVATED BURGLARY (amended) - 2nd Degree Felony  
Plea: Guilty - Disposition: 03/12/2007 Guilty
2. AGGRAVATED ASSAULT - 3rd Degree Felony  
Plea: Guilty - Disposition: 03/12/2007 Guilty

HEARING

TAPE: 9-08 W47 COUNT: 10:22

This case is before the Court for a restitution hearing. Court orders full restitution to be paid.

Restitution Amount: \$2970.72 Plus Interest  
Pay in behalf of: SPRING WEATHERSPOON


Case No: 071900771  
Date: Apr 18, 2008

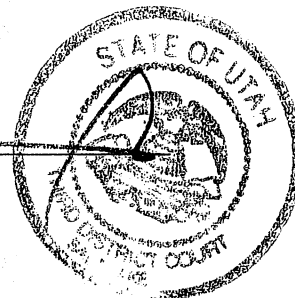
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SENTENCE TRUST NOTE

Defendant to pay \$50.00 per month with payments to be made to AP&P  
with first payment due end of May 2008

Dated this 21 day of April, 2008.

  
STEPHEN L. HENRIOD  
District Court Judge



Tab B



**Utah Code Ann. § 63-25a-403 (2004)**

§ 63-25a-403. Restitution--Reparations not to supplant restitution-- Assignment of claim for restitution judgment to Reparations Office

(1) A reparations award shall not supplant restitution as established under Title 77, Chapter 38a, Crime Victims Restitution Act, or as established by any other provisions.

(2) The court shall not consider a reparations award when determining the order of restitution nor when enforcing restitution.

(3) If, due to reparation payments to a victim, the Reparations Office is assigned under Section 63-25a-419 a claim for the victim's judgment for restitution or a portion of the restitution, the Reparations Office may file with the sentencing court a notice of the assignment. The notice of assignment shall be signed by the victim and a Reparations Officer and shall state the amount of the claim assigned.

(4) Upon conviction and sentencing of the defendant, the court shall enter a civil judgment for complete restitution as provided in Section 77-38a-401 and identify the Reparations Office as the assignee of the assigned portion of the judgment.

(5) If the notice of assignment is filed after sentencing, the court shall modify the civil judgment for restitution to identify the Reparations Office as the assignee of the assigned portion of the judgment.

Laws 1986, c. 150, § 2; Laws 1989, c. 46, § 3; Laws 1993, c. 72, § 2; Laws 1996, c. 242, § 34, eff. April 29, 1996; Laws 2000, c. 235, § 2, eff. May 1, 2000; Laws 2002, c. 35, § 2, eff. May 6, 2002.

**Utah Code Ann. §63-25a-419 (2004)**

§ 63-25a-419. Assignment of recovery--Reimbursement

(1) By accepting an award of reparations, the victim automatically assigns to the state, subject to the provisions of Subsection (2), all claims against any third party to the lesser of:

(a) the amount paid by the state; or

(b) the amount recovered from the third party.

(2) The board, with the concurrence of the director, may reduce the state's right of reimbursement if it is determined that the reduction will benefit the fund.

(3) The state reserves the right to make a claim for reimbursement on behalf of the victim and the victim shall not impair the state's claim or the state's right of reimbursement.

Laws 1993, c. 72, § 16; Laws 1996, c. 242, § 50, eff. April 29, 1996; Laws 2000, c. 235, § 10, eff. May 1, 2000; Laws 2002, c. 256, § 53, eff. July 1, 2002.

**Utah Code Ann. § 76-3-201 (Supp. 2007)**

§ 76-3-201. Definitions--Sentences or combination of sentences allowed-- Civil penalties--Hearing

(1) As used in this section:

(a) "Conviction" includes a:

(i) judgment of guilt; and

(ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e)(i) "Victim" means any person who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal or disqualification from public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment;

(e) on or after April 27, 1992, to life in prison without parole; or

(f) to death.

(3)(a) This chapter does not deprive a court of authority conferred by law to:

(i) forfeit property;

(ii) dissolve a corporation;

(iii) suspend or cancel a license;

(iv) permit removal of a person from office;

(v) cite for contempt; or

(vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4)(a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(5)(a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

(i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;

(ii) charged with a felony or a class A, B, or C misdemeanor; and

(iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental

transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c)(i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) \$75 for up to 100 miles a defendant is transported;

(B) \$125 for 100 up to 200 miles a defendant is transported; and

(C) \$250 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(6)(a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court pursuant to Subsection (6)(c), the defendant shall pay restitution to the county for the cost of incarceration in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii)(A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13e-104 if the defendant is a state probationary inmate, as defined in Section 64-13e-102, or a state parole inmate, as defined in Section 64-13e-102.

(b)(i) The costs of incarceration under Subsection (6)(a) are the daily inmate

incarceration costs and medical and transportation costs for the county correctional facility.

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining whether to order that the restitution required under this Subsection (6) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (iv) and shall enter the reason for its order on the record.

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

Laws 1973, c. 196, § **76-3-201**; Laws 1979, c. 69, § 1; Laws 1981, c. 59, § 1; Laws 1983, c. 85, § 1; Laws 1983, c. 88, § 3; Laws 1984, c. 18, § 1; Laws 1986, c. 156, § 1; Laws 1987, c. 107, § 1; Laws 1990, c. 81, § 1; Laws 1992, c. 142, § 1; Laws 1993, c. 17, § 1; Laws 1994, c. 13, § 19; Laws 1995, c. 111, § 1, eff. May 1, 1995; Laws 1995, c. 117, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 1, eff. May 1, 1995; Laws 1995, c. 337, § 1, eff. May 1, 1995; Laws 1995, 1st Sp.Sess., c. 10, § 1, eff. April 29, 1996; Laws 1996, c. 40, § 1, eff. April 29, 1996; Laws 1996, c. 79, § 98, eff. April 29, 1996; Laws 1996, c. 241, §§ 2, 3, eff. April 29, 1996; Laws 1998, c. 149, § 1, eff. May 4, 1998; Laws 1999, c. 270, § 15, eff. May 3, 1999; Laws 2001, c. 209, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 4, eff. May 6, 2002; Laws 2003, c. 280, § 1, eff. May 5, 2003; Laws 2006, c. 208, § 1, eff. May 1, 2006; Laws 2007, c. 154, § 1, eff. April 30, 2007; Laws 2007, c. 339, § 3, eff. April 30, 2007; Laws 2007, c. 353, § 9, eff. April 30, 2007.

**Utah Code Ann. §77-38a-101 (2003)**

§ 77-38a-101. Title

This chapter is known as the "Crime Victims Restitution Act."

Laws 2001, c. 137, § 2, eff. April 30, 2001.

**Utah Code Ann. § 77-38a-102 (Supp. 2008)**

§ 77-38a-102. Definitions

As used in this chapter:

(1) "Conviction" includes a:

- (a) judgment of guilt;
- (b) a plea of guilty; or
- (c) a plea of no contest.

(2) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.



(9) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(10) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12)(a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14)(a) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

Laws 2001, c. 137, § 3, eff. April 30, 2001; Laws 2003, c. 278, § 2, eff. May 5, 2003; Laws 2005, c. 96, § 3, eff. May 2, 2005.

**Utah Code Ann. §77-38a-201 (2003)**

§ 77-38a-201. Restitution determination--Law enforcement duties and responsibilities

Any law enforcement agency conducting an investigation for criminal conduct which would constitute a felony or class A misdemeanor shall provide in the investigative reports whether a claim for restitution exists, the basis for the claim, and the estimated or actual amount of the claim.

Laws 2001, c. 137, § 4, eff. April 30, 2001.

**Utah Code Ann. § 77-38a-202 (2003)**

**§ 77-38a-202. Restitution determination--Prosecution duties and responsibilities**

(1) At the time of entry of a conviction or entry of any plea disposition of a felony or class A misdemeanor, the attorney general, county attorney, municipal attorney, or district attorney shall provide to the district court:

- (a) the names of all victims, including third parties, asserting claims for restitution;
- (b) the actual or estimated amount of restitution determined at that time; and
- (c) whether or not the defendant has agreed to pay the restitution specified as part of the plea disposition.

(2) In computing actual or estimated restitution, the attorney general, county attorney, municipal attorney, or district attorney shall:

- (a) use the criteria set forth in Section 77-38a-302 for establishing restitution amounts; and
- (b) in cases involving multiple victims, incorporate into any conviction or plea disposition all claims for restitution arising out of the investigation for which the defendant is charged.

(3) If charges are not to be prosecuted as part of a plea disposition, restitution claims from victims of those crimes shall also be provided to the court.

Laws 2001, c. 137, § 5, eff. April 30, 2001.

**Utah Code Ann. §77-38a-203(Supp. 2008)**

**§ 77-38a-203. Restitution determination--Department of Corrections-- Presentence investigation**

(1)(a) The department shall prepare a presentence investigation report in accordance with Subsection 77-18-1(5). The prosecutor and law enforcement agency involved shall provide all available victim information to the department upon request. The victim impact statement shall:

(i) identify all victims of the offense;

(ii) itemize any economic loss suffered by the victim as a result of the offense;

(iii) include for each identifiable victim a specific statement of the recommended amount of complete restitution as defined in Section 77-38a-302, accompanied by a recommendation from the department regarding the payment by the defendant of court-ordered restitution with interest as defined in Section 77-38a-302;

(iv) identify any physical, mental, or emotional injuries suffered by the victim as a result of the offense, and the seriousness and permanence;

(v) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(vi) identify any request for mental health services initiated by the victim or the victim's family as a result of the offense; and

(vii) contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(b) The crime victim shall be responsible to provide to the department upon request all invoices, bills, receipts, and other evidence of injury, loss of earnings, and out-of-pocket loss. The crime victim shall also provide upon request:

(i) all documentation and evidence of compensation or reimbursement from insurance companies or agencies of the state of Utah, any other state, or federal government received as a direct result of the crime for injury, loss, earnings, or out-of-pocket loss; and

(ii) proof of identification, including date of birth, Social Security number, drivers license number, next of kin, and home and work address and telephone numbers.

(c) The inability, failure, or refusal of the crime victim to provide all or part of the requested information shall result in the court determining restitution based on the best information available.

(2)(a) The court shall order the defendant as part of the presentence investigation to submit to the department any information determined necessary to be disclosed for the purpose of ascertaining the restitution.

(b) The willful failure or refusal of the defendant to provide all or part of the requisite information shall constitute a waiver of any grounds to appeal or seek future amendment or alteration of the restitution order predicated on the undisclosed information.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution recommended in the presentence investigation, the court shall set a hearing date to resolve the matter.

(d) If any party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

Laws 2001, c. 137, § 6, eff. April 30, 2001; Laws 2005, c. 96, § 4, eff. May 2, 2005.

**Utah Code Ann. §77-38a-301 (2003)**

§ 77-38a-301. Restitution--Convicted defendant may be required to pay

In a criminal action, the court may require a convicted defendant to make restitution.

Laws 2001, c. 137, § 7, eff. April 30, 2001.

Utah Code Ann. §77-38a-302 (Supp. 2008)

§ 77-38a-302. Restitution criteria

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or

destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution inappropriate.

(d)(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.



(c) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

Laws 2001, c. 137, § 8, eff. April 30, 2001; Laws 2002, c. 35, § 13, eff. May 6, 2002;  
Laws 2002, c. 185, § 51, eff. May 6, 2002; Laws 2003, c. 285, § 1, eff. May 5, 2003;  
Laws 2005, c. 96, § 5, eff. May 2, 2005.

Tab C

State v. Wessendorf  
Utah App.,2006.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of Utah.  
STATE of Utah, Plaintiff and Appellee,  
v.  
Darrell Lawrence WESSENDORF,  
Defendant and Appellant.  
No. 20050771-CA.

May 11, 2006.

Eighth District, Duchesne Department,  
041800170; The Honorable John R.  
Anderson.

Cindy Barton-Coombs, Roosevelt, for  
Appellant.  
Mark L. Shurtleff and Matthew D. Bates,  
Salt Lake City, for Appellee.

Before Judges BENCH, BILLINGS, and  
THORNE.

MEMORANDUM DECISION (Not For  
Official Publication)

PER CURIAM:

\*1 Darrell Lawrence Wessendorf appeals  
the trial court's order of restitution. He  
asserts the amount of restitution was  
improperly determined. Although  
Wessendorf has filed his opening brief,  
this is before the court on the State's  
motion for summary reversal because the  
State concedes there was error.

At the hearing to determine restitution,  
the victim testified that she did not have  
the vehicle repaired, but instead sold it

for about the same amount for which she  
had bought it. Even though she did not,  
and would not, incur economic damage  
based on the repair estimate, the trial  
court awarded restitution based on the  
repair estimate. The State concedes that  
this was an inappropriate measure of  
restitution.

Restitution is the payment of **pecuniary**  
damages resulting from a defendant's  
criminal conduct. *See* Utah Code Ann. §  
77-38a-102(11) (Supp.2005). **Pecuniary**  
damage is demonstrable economic  
injury. *See id.* § 77-38a-102(6). "The  
appropriate measure of the loss or  
damage to a victim is fact-sensitive and  
will vary based on the facts of a  
particular case." *State v. Corbitt*, 2003  
UT App 417, ¶ 15, 82 P.3d 211. Although  
the estimated cost of repair of the vehicle  
damage was about \$1200, the victim did  
not suffer economic injury in that  
amount because she did not have the  
repairs performed. There was no  
testimony about any out-of-pocket  
expense that the victim incurred due to  
Wessendorf's conduct. However, there  
was testimony that the vehicle market  
value may have been reduced by  
Wessendorf's conduct, which would be a  
more appropriate measure of economic  
loss if proven.

Accordingly, we vacate the trial court's  
restitution order and remand for a new  
restitution hearing. We need not reach  
the other issues raised by Wessendorf  
because we remand for a new hearing.

Utah App.,2006.  
State v. Wessendorf  
Not Reported in P.3d, 2006 WL 1285028